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Supreme Court, U.S.
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No. 96-1792

In The

Supreme Court of the United States

October Term, 1996

BRIAN OVERBEEK,

Petitioner,

vs.

CHARLES HEIMBECKER, RICHARD HELLENBRAND and GENERAL CASUALTY COMPANY OF WISCONSIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GENERAL CASUALTY COMPANY OF WISCONSIN

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QUESTIONS PRESENTED

1. Whether the District Court for the Western District of Wisconsin and the Court of Appeals for the Seventh Circuit properly ruled that the Petitioner was not entitled to prejudgment interest against Respondent, General Casualty, based upon the terms of General Casualty's contract of insurance and upon Wisconsin case law.

2. Whether the District Court for the Western District of Wisconsin and the Court of Appeals for the Seventh Circuit properly based their rulings on the undisputed fact that General Casualty offered to pay the Petitioner its policy limits (and sometimes more) on at least one dozen occasions, and upon the finding that the only reason payment was not accepted was Petitioner's counsel's intransigence.

LIST OF INTERESTED PARTIES AND STATEMENT PURSUANT TO RULE 29.6

None of the issues presented by this Petition pertain to the Respondents Heimbecker and Hellenbrand. The Respondent Hellenbrand has been granted a discharge in bankruptcy. The Respondent General Casualty Company of Wisconsin is a corporation. Ownership of General Casualty is divided as follows: 15% by Republic Insurance Company and 85% by Winterthur U.S. Holdings.

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INTRODUCTION

General Casualty opposes the Petition for Writ of Certiorari and relies upon the reasons which are fully articulated in both the Opinion and Order of Judge Barbara B. Crabb, entering Judgment in this matter before the District Court for the Western District Court of Wisconsin, and in the Opinion written by Judge Terence T. Evans of the Court of Appeals for the Seventh Circuit, affirming the District Court's Order.

The basis for rejection of the Petition is that the Petitioner completely ignores directly applicable contract language and directly applicable case law, despite the fact that the Court of Appeals pointed out that the Petitioner had already neglected both of these issues when making his appeal to that court.

(1) The Petitioner sued General Casualty on the basis of its contract of insurance and has asked the courts to render judgment and to impose prejudgment interest costs on the basis of the contract of insurance, but does not cite to the contract. Nor does he mention that the contract in question only obligates the insurer for interest *after* a Judgment is entered, and terminates even that obligation when the policy limits are "offered." It is undisputed that the policy limits were offered on numerous occasions. The Court of Appeals explicitly noted this flaw in Petitioner's argument, but the Petitioner ignores the Court of Appeals' comments in submitting the present Petition.

(2) The Petitioner asserts that Wisconsin law mandates that prejudgment interest be awarded under Wisconsin statute § 814.14(4), and asserts that the statute must be applied against General Casualty in this action. However, as the Respondent and the Court of Appeals pointed out in rejecting Petitioner's arguments on appeal, there is clear Wisconsin authority directly contrary to the Petitioner's position which he "conveniently

ignored" in appealing to that court. The case of *Blank v. USAA Property & Casualty Ins. Co.*, 200 Wis. 2d 270, 281, 546 N.W. 2d 512 (Ct. App. 1996), clearly states that an insurer cannot be made liable for interest on a Judgment under its policy of insurance if the policy terms do not provide for such an obligation. The Petitioner has completely ignored that authority, as well as other authorities on issues such as the propriety of the courts' application of equitable considerations.

(3) Finally, the Petitioner questions the propriety of the District Court's and Court of Appeals' conclusion that there were sufficient offers of payment in this case to toll any alleged accrual of interest in this case. However, Petitioner cannot and does not dispute the underlying facts that there were over one dozen offers of payment, including offers that were double General Casualty's policy limits.

In sum, the Petitioner's arguments are without merit. The Respondent has refrained from moving for costs or sanctions. However, two courts have now stated in their opinions that the Petitioner's arguments are frivolous. As the District Court stated, the Petitioner's counsel has needlessly squandered the resources of three courts and needlessly caused General Casualty to incur expenses to oppose his various motions, appeals and petitions over the course of nearly nine (now eleven) years.

The present Petition is merely a continuation of the Petitioner's pattern of pursuing unsupported motions and appeals, thus forcing General Casualty to incur even more needless expense. It is respectfully submitted that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

The facts relevant to the Petition are undisputed and are properly reflected in the opinions of both the District Court and the Court of Appeals, which are attached to the Petitioner's submission.

This case arises out of a June 1, 1985 automobile accident. A bifurcated civil jury trial was held in the District Court for the Western District of Wisconsin in early October of 1987, with the jury returning with the damages portion of the verdict on October 9, 1987. As indicated in the Petitioner's Statement of the Case, an apparent clerical oversight resulted in judgment being entered only against the individual defendants, Heimbecker and Hellenbrand. However, judgement was not entered against General Casualty, a named defendant whose policy limits of $25,000 were entered as evidence at the trial.

As regards the procedural events after that point, including an abortive appeal before the Seventh Circuit, the court is referred to the succinct summaries given in the District Court's Opinion, Petitioner's Appendix, pp. 1-5 and the Court of Appeals' Opinion, Petitioner's Appendix, pp. 9-12.

As stated therein, it was not until over four and one-half years after the dismissal of the earlier abortive appeals that the Petitioner finally brought the Motion in the District Court which led to the order that is now the subject of this appeal. The Motion was filed with Judge Crabb, who was intimately familiar with the specifics of this case, having presided over the Trial and having entertained all Motions and hearings over the years after the Trial.[1] The Petitioner argued for entry of judgment in the

1. This does not include the 1994 case filed in Cook County, Illinois in which the Petitioner sought Judgment against General Casualty in the amount (Cont'd)

amount of $50,000 plus eight years of prejudgment interest (at 12%) on the $2.2 million dollar judgment entered against Heimbecker and Hellenbrand individually.

The District Court rejected those arguments. Petitioner then appealed to the Seventh Circuit, which also rejected his arguments, rather soundly, and he now brings this Petition to the Supreme Court of the United States.

The issues have now narrowed. The frivolous argument for double coverage has been dropped, as has any request for post-judgment interest. The refusal of the District Court to allow taxation of costs has likewise been dropped. The claim made in this Petition is that all prior courts have misapplied a Wisconsin statute, although the Petitioner does not respond to the cases cited by the Respondents and the Court of Appeals. Nor does the Petitioner even mention the contract provision at issue, although presumably that is the only basis for his recovery. He certainly does not dispute the validity of the terms of that contract, and never has. Finally, he characterizes the two prior courts' discussion about adequate tender as being based upon "circumstantial" evidence, without ever refuting the underlying factual basis documenting the many times the money was offered in this case.

Facts which are relevant, but which are not mentioned by the Petitioner, include the General Casualty policy language. The relevant terms of the policy are undisputed and state in relevant part:

(Cont'd)
of $25,000 (an amount he then refused to accept upon dismissal of that action and return to the federal District Court) Judge Crabb appropriately referred to that excursion as the Petitioner taking the "inexplicable step of suing defendant General Casualty in Cook County Illinois . . ." (Petitioner's Appendix, p. 4.)

SUPPLEMENTARY PAYMENTS

In addition to our limit of liability, we will pay on behalf of a covered person:

* * *

3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.

As the District Court held, General Casualty is only obligated under the contract to pay interest *after* a *judgment* is entered, and this obligation terminates when the policy limits are "offered".

Other facts which are undisputed in the record include all of the attempted "offers" to pay the undisputed policy limits of $25,000 to the Petitioner and his counsel. The relevant underlying facts were set forth in detail in the Affidavits submitted to both the Trial Court and the Court of Appeals. General Casualty therefore denies the contentions on pages 17 and 18 of the Petitioner claiming they never offered or tendered their $25,000 policy limits. Those contentions fly in the face of a well-documented record which was provided to the District Court and never refuted by the Petitioner — hardly the mere "circumstantial evidence" listed by Petitioner. Further, the Petitioner has never presented any contrary documentation to refute the clear and undisputed documentation submitted by General Casualty.

It thus remains as a documented and undisputed fact of record that over one dozen attempts were made by General Casualty to pay the policy limits to the Petitioner's counsel, as noted by both the District Court and the Court of Appeals. (Petitioner's Appendix, pp. 6, 9, 14-15.) Specifically, it is undisputed that General Casualty offered its policy limits on October 15, 1987, six days after the jury reached its damages verdict. (*Id.* at p. 6.) The District Court cited this date specifically, as did the Court of Appeals. The Petitioner failed to mention that date in his Petition to this Court.

Other facts not disputed or addressed by the Petitioner include all of the facts supporting the District Court's ruling that:

> Because it has been Plaintiff's counsel intransigence that has prevented the amount of defendants' obligation from being reduced to judgment, it would be unfair to hold General Casualty liable for prejudgment interest.

(Petitioner's Appendix, p. 7.)

The Court of Appeals clearly shared this conclusion.

STATEMENT OF STANDARD OF REVIEW

The Petitioner has indicated no standard of review. The Respondent's position is that the District Court's Opinion and Order was well within the sound discretion of that court and was correct as applying state law to the undisputed facts.

It is well established that a District Court's exercise of discretion will not be reversed unless it constitutes an abuse of

discretion. *See, e.g., Coyne-Delany v. Capital Dev. Bd. of State of Ill.*, 717 F.2d 385 (7th Cir. 1983). The Court of Appeals found no fault with any of the decisions of the District Court.

The District Court articulated its reasoning and gave ample support for its decision. The facts at the basis of the District Court's opinion are undisputed and documented. The salient features of the present litigation involved documented procedural history, representations made on record in front of the District Court, and correspondence submitted on Affidavit.

The substantive law at issue is state law. State law governs on contracts of insurance, and state law governs on the issue of prejudgment interest. *See Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1053 (7th Cir. 1988). The District Court's application of the law to the facts was proper.

Finally, the District Court also properly interpreted the Wisconsin statutes at issue in this matter. The Court of Appeals, specifically, drew the Petitioner's attention to Wisconsin case law which is directly on point. The Petitioner had ignored that opinion, although cited by the Respondents, and ignores it once again in his presentation to this Court.

REASONS FOR DENYING THE WRIT

I.

GENERAL CASUALTY OWES NO INTEREST ON THE JUDGMENT AGAINST ITS INSUREDS.

Prejudgment interest is governed by state law. *See Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1051 (7th Cir. 1988). The "federal court must look to state law to determine the propriety of prejudgment interest on a recovery." *Id.* at 1051.

General Casualty's obligations for interest, if any, under state law, are limited to the terms of its contract of insurance with its insured. An insurer's obligations in Wisconsin are determined by the terms of the contract of insurance. *See, e.g., City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 764, 517 N.W. 2d 463 (1994); *Schmude v. Hansen*, 28 Wis. 2d 326, 333, 137 N.W. 2d 61 (1965). Specifically, an insurer's obligation for payment of prejudgment interest depends on its policy provisions. It is unclear to what extent, if any, Petitioner now seeks reversal of lower court rulings that General Casualty is not responsible for payment of interest on any judgment against its insureds. To the extent the instant Petition does seek to address those rulings, its logic is faulty.

Petitioner's comments to the contrary, Wisconsin law does not impose interest on an insurer in excess of its policy limits or policy provisions. The case of *Blank v. USAA Property & Casualty Ins. Co.*, 200 Wis. 2d 270, 281, 546 N.W. 2d 512 (Ct. App. 1996) is directly on point, but is not mentioned by the Petitioner, despite being highlighted by the Respondent *and* the Court of Appeals. (Petitioner's Appendix p. 12.) *Blank* makes clear that it is the terms of the insurance contract which govern the insurer's obligation, if any, with regard to interest on a judgment:

> Section 814.14(4), Stats., does not impose interest on the verdict upon the insurer for sums in excess of policy limits. The statute merely directs the clerk how to compute the interest on the verdict; contrary to plaintiff's contention, whether the insurer and not the insured is to pay this interest depends upon the terms of their insurance contract.

Blank, at 281.

The *Blank* court cited both *Nichols v. United States Fidelity & Guaranty Co.*, 13 Wis. 2d 491, 501, 109 N.W. 2d 131, 136-137 (1961) and *McPhee v. American Motorists Ins. Co.*, 57 Wis. 2d 669, 672-673, 205 N.W. 2d 152 (1973), emphasizing that an insurer's obligations for interest on a judgment depend upon the language of the contract of insurance. The Petitioner claims the Court of Appeals ignored a "mandatory" state statute, yet he ignores the state law interpreting that statute.

The Petitioner also ignores the contract of insurance at issue in this case. As emphasized by both the District Court and the Court of Appeals, the relevant terms of the policy (cited in the Statement of the Case) are undisputed and clearly exclude any obligation for *pre*judgment interest.

The District Court held that General Casualty is only obligated under the contract to pay interest *after* a *judgment* is entered. This necessarily excludes responsibility for *pre*judgment interest. It also means that General Casualty's obligation to pay *any* interest *ends* when they *offer* to pay the limits of their liability. The District Court held as follows:

> Once [General Casualty] offered the policy limits on October 15, 1987, one week after the verdict was rendered and a week before entry of judgment, its obligation to pay interest expired.

(Petitioner's Appendix p. 6.)

II.

GENERAL CASUALTY OWES NO INTEREST ON THE AMOUNT OF THE $25,000 LIMIT OF LIABILITY.

A. General Casualty's Offer(s) Of Payment Tolled The Running Of Interest And The Petitioner Has Waived His Right To Claim Interest By His Failure To Accept Such Offers.

Had there been a valid Judgment timely entered against General Casualty, it would have owed its $25,000 limit of liability and any applicable statutory interest, whether prejudgment interest under Wisconsin law, or post-judgment interest under Federal law. However, interest would apply to *that* amount only, and would be tolled under Wisconsin law once a valid offer of payment of that amount was made to the Petitioner.

The only salient and relevant facts are: (1) no Judgment was initially rendered against General Casualty because Petitioner's counsel objected to entry of Judgment; and (2) General Casualty repeatedly made offers to pay the limit of liability immediately, including *before* trial, *during* trial, and within one week of the verdict. Once their offer of payment was refused, the accrual of interest ceases. The failure to accept the payment, and responsibility for loss of the "use" of that money, is on Petitioner's counsel.

Wisconsin law clearly establishes that a valid offer of payment which is refused tolls the running of interest. The Petitioner cited the cases of *Giffin v. Tigerton Lumber Co.*, 26 Wis. 2d 327, 132 N.W. 2d 572 (1965), and *Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 707, 445 N.W. 2d 717 (Ct. App. 1989) to support his argument that payment of less than the full

amount due cannot toll the running of interest. As found by both lower courts, $25,000 was the full amount due. Moreover, those same cases stand for the principle that when an offer of the amount owed is made, and rejected, the accrual of interest is tolled.

In *Giffin, supra,* at 334, the court explained that had the defendant offered the amount then determinable as owed, "[s]uch an action would have stopped the running of interest to the extent of the tender." *See also Loehrke, supra,* at 707. Similarly, in *Kiefert v. Maple Valley Mut. Home F. Ins. Co.*, 158 Wis. 340, 341-342, 148 N.W. 864 (1914), it was held: "the offer of a check constitutes a good tender so as to stop interest if no objection be made to it at the time on the ground that it is not legal tender, but it is refused on some ground, as for instance that it is not enough."

The tolling the accrual of interest makes good public policy and equitable sense. Both parties agree the reason behind providing statutory interest is to encourage prompt payment of judgments. *See Zintek v. Perchik*, 163 Wis. 2d 439, 479, 471 N.W. 2d 522 (Ct. App. 1991). The statutory accrual of interest provides a clear incentive to make timely offers of payment. The natural corollary of that principle, however, is that ***timely offers must be accepted***, and that a party cannot benefit from the statutory interest rate after having rejected a timely offer.

One valid offer is sufficient for tolling purposes. The District Court noted "innumerable" such offers in this case. The Court of Appeals added up thirteen times Petitioner's counsel rejected offers. As the District Court also noted, it was the intransigence of Petitioner's counsel and his refusal to accept the offer because he was maintaining a frivolous argument for "dual coverage," which caused the delay in payment.

B. There Is No Prejudgment Interest When The Amount Is Uncertain.

Another argument ignored by the Petitioner, despite being noted by the District Court, is the fact prejudgment interest is not properly awarded when the amount owed was never fixed or certain. Under Wisconsin law, as the District Court correctly explained, prejudgment interest is only appropriate if the amount owed is fixed and certain. *See, e.g., Northbrook Excess & Surplus v. Procter & Gamble*, 924 F.2d 633, 640 (7th Cir. 1991); *Wheeler v. John Deere Co.*, 986 F.2d 413, 416 (10th Cir. 1993); *See also Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 707, 445 N.W. 2d 717 (Ct. App. 1989).

The District Court observed that it was the Petitioner's counsel who "refused to identify the amount of the fixed sum for liability coverage owed by General Casualty." (Petitioner's Appendix, p. 7.) Again, as the record shows, Petitioner's counsel deliberately ignored the District Court's instructions in February of 1988 to simply agree that the amount of the judgment should be entered at $25,000. If the amount of General Casualty's obligation was not fixed and certain, then this doctrine also precludes the Petitioner from claiming prejudgment interest.

C. It Was Appropriate For The Court Of Appeals And The District Court To Apply Equitable Considerations.

The Petitioner asserts that the Court of Appeals' application of equitable considerations to deny an interest award is improper. The Petitioner is simply mistaken. Cases he cites, such as *West Virginia v. United States*, 479 U.S. 305, 311 n. 3, 107 S. Ct. 702, 706 n. 3 (1987) and *Board of Commissioners of Jackson County, Kansas v. United States*, 308 U.S. 343, 60 S. Ct. 285, 84 L. Ed. 313 (1939), prove just the opposite. The Petitioner cited to footnote three in *West Virginia*. He was evidently

referring to the first sentence, but he left out the next sentence, which states: "This is not to say that an equitable consideration such as laches cannot bar an otherwise valid claim for interest." *Id.* That essentially sums up the situation here, whether one wants to call it laches, tolling, waiver, or inequitable conduct.

Board of Commissioners also fails to support the Petitioner's arguments. The facts of that case are wholly dissimilar to the instant case, dealing as they do with the interplay between a treaty the United States made with the Pottawatomie tribe and local property tax law. However, the Court did indicate that "[t]he cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness." *Board of Commissioners*, 308 U.S. 343 at 352.

Similarly, in *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1334 (7th Cir. 1992), this Court explained:

> We remarked in *Williamson* that "[s]ubstantial, unexplained delay in filing suit might be a reason, because delay shifts the investment risk to the defendant, allowing the plaintiff to recover interest without bearing the corresponding risk." 817 F.2d at 1298. The Supreme Court reinforced this in *West Virginia* by stating that laches could justify a denial of interest. 479 U.S. at 311 n. 3, 107 S. Ct. at 706 n. 3.

The point is that the Court is not without discretion or power to refuse to award interest which accumulated *because of the delays and derelictions created by counsel* for the prevailing party. That conduct is amply detailed in the opinions of both courts below.

By claiming interest over the course of all these years, the Petitioner seeks to take advantage of the delay caused by the lack of final judgment against General Casualty. The Respondent has not found any cases presenting the same types of delay that were involved in this fact scenario, but there are several cases which appear comparably tortured. For the most part, these cases involve failures to seek timely correction of mandates after appeal. The principle which emerges from these cases is applicable here: a party may not extract a benefit of interest when the delays are caused by that party, and when the party has failed to take the easy and obvious measures required to correct the situation.

In *Vickers v. Chiles Drilling Co.*, 882 F.2d 158, 159 (5th Cir. 1989), the Court of Appeals explained the typical situation as follows:

> If an appellate court reverses or modifies a judgment with a direction that a judgment be entered against a party, the mandate from the appellate court must specifically order that interest run from the date of the first judgment, else interest runs from the date of the second, modified judgment. F.R.A.P. 37; *Gele v. Wilson*, 616 F.2d 146 (5th Cir. 1980); *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948). Even if this is the result of inadvertence on the part of the appellate court, *the appropriate procedure is to file a motion to reform the mandate* under Federal Rule of Appellate Procedure 37. *Since no such motion was filed, we reverse* the district court insofar as it awarded post-judgment interest on Vickers' future losses, and render the judgment to grant interest on the award

> of $119,554.00 from September 29, 1988, the date of the second judgment in this case.

(Emphasis added.)

The Court of Appeals undoubtedly has the *power* to make corrections in its mandates as justice requires. However, the courts have consistently required diligence on the part of the party seeking correction, and have consistently prevented a delaying party from benefitting from self-created or self-perpetuated delay.[2] The Petitioner completely lacked such diligence in this case.

For instance, in *Lee v. Terminal Transport Co.*, 301 F.2d 234, 236 (7th Cir. 1962), the Petitioners sought belated correction of a Court of Appeal's mandate to receive post-judgment interest. The Court of Appeals rejected the plea owing to the excessive delay and explained that the defendants should not be made to pay for the Petitioner's delay.

> Plaintiffs have waited approximately 29 months from the time the mandate issued to seek this relief . . . Defendants should not now be penalized because of plaintiffs' subsequent abortive actions.

In *Bankers Life And Casualty Co. v. Bellanca Corporation*, 308 F.2d 759, 759 (7th Cir. 1962), *cert. denied*, 368 U.S. 827, 82 S. Ct. 47, the Court explained that its power is not available for the convenience (or abuse) of the litigants, and that a party who takes no timely action to seek correction is not entitled to benefit over the period of the delay.

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2. Those cases which involve a request for post-judgment interest on a claim which was never rendered into a final judgment emphasize that delays are important factors in weighing against allowance of the claim. *See, e.g., Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111 (5th Cir. 1985).

> Bankers took no timely action in this Court to request a recall and modification of the mandate for the purpose of obtaining the relief to which it claims it is entitled. It is now too late for it to do so. While the power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, it has not been held to survive for the convenience of litigants.

(Citations omitted.)

Other circuits have applied these same principles. In *Nat. Sur. Corp. v. Charles Carter & Co., Inc.*, 621 F.2d 739, 741-742 (5th Cir. 1980), the issue was whether the petitioner could still seek correction on the failure of the Court of Appeals to include prejudgment interest in its mandate. The Court of Appeals explained that it does have that power, but that to secure such relief a party must act promptly when it knows of the mistake. As here, the party seeking the correction in *National Surety* waited many years before seeking correction of the claimed mistakes. The court denied relief because the delay was extreme and essentially unexcused.

> National Surety's *excessive delay in seeking reform* of our November 23, 1976 mandate *weighs most heavily against any grant of relief.* The mandate clearly precluded an award of prejudgment interest on remand, and National Surety *should have acted promptly to place its objection to the mandate before this Court.*

Id. at 741-742 (emphasis added.)

The court in *National Surety* noted that despite knowing of the claimed error, no petition for rehearing or motion for correction was filed. *See also Gele v. Wilson*, 616 F.2d 146, 149 (5th Cir. 1980), in which the court explained:

> [A] party who conceives himself to be entitled to interest from a date other than judgment on remand should seek reformation of this court's mandate in a petition for rehearing . . . One who fails to seek such a reformation may not later complain that the district court should have calculated interest from an earlier date.

(Citations omitted.)

Finally, in *Explosives Corp. of America v. Garlam Ent. Corp.*, 817 F.2d 894 (1st Cir. 1987), *cert. denied*, 484 U.S. 925, 108 S. Ct. 286-287, and *LeRoy v. City of Houston*, 906 F.2d 1068 (5th Cir. 1990), a couple of cases with facts in part strikingly similar to the situation created by Petitioner's counsel here, the courts denied relief. In *Explosives*, the Court of Appeals refused to allow interest from the initial judgment where the party never sought a Rule 54(b) determination, "even though it had been alerted to the problem" by the court in time to properly seek correction, but had sought an abortive appeal instead of seeking a proper determination of the amount owed in the District Court. *Explosives*, at 903-904. The Petitioner was given such an opportunity by the District Court in February of 1988, and declined.

In *LeRoy*, the court emphasized that part of the reason for denying the relief requested was the deliberate refusal of the party to follow the clear direction given it by the court on how to correct the defect in a timely manner. *LeRoy*, at 1074-1075.

In that case, as here, the party "adamantly refused to file a motion to recall the mandate," and instead went to another court which had no authority to grant the relief requested, despite the fact that the court drew this to the party's attention, and despite the clear case law which showed the futility of that step. *Id.* at 1075. As here, "[n]o reason or excuse for this failure [to take the recommended and proper procedure] has ever been proffered." The Court of Appeals concluded:

> The consequence of taking this position was a vast waste of time and much unseemly wrangling about collection of a judgment which would have been paid had it not included that which our mandate did not authorize and hence precluded.

Id.

The one Wisconsin case cited by the Petitioner on this topic, *Anderson v. Kojo*, 110 Wis. 2d 22, 327 N.W. 2d 195 (1982), is not on point. *Anderson* concerns collection on a Judgment, and is otherwise distinguishable on its facts. *Anderson* does *not* hold that a plaintiff is entitled to interest and costs upon any delay *"even if occasioned by the plaintiff,"* as suggested by Petitioner. (Petition for Writ, p. 15.) To the contrary, *Anderson* substantiates the argument that equitable doctrines *remain* applicable, even within the periods allowed for statutory time limitations. As such, the *Anderson* opinion serves to defeat, not support, Petitioner's position. The case does not stand for the proposition that an equitable defense of laches was not available in such a situation, it merely found that the doctrine did not apply under the facts involved in that case. *Anderson* lacked an essential element found in this case — the Defendant's numerous offers to pay their liability, even before a Judgment was entered against them.

The Petitioner's reference to General Casualty's "enjoyment of the benefit" of retaining the money must also be completely rejected. That characterization of the actual events is hardly accurate and the implication that equity would be served by punishing General Casualty for the Petitioner's delay and intransigence was properly rejected by the District Court and the Court of Appeals.

No money was "wrongly retained." General Casualty offered the money repeatedly. If anything, those offers were "wrongly" refused based upon whatever excuse Petitioner's counsel found convenient at the time, be it the "dual coverage" argument, the alleged but never pursued claim of bad faith (which was threatened but then dropped), or simply failure to respond to the offers. As the District Court told Petitioner's counsel at the hearing in September of 1995, "You could have had that money for your client seven and a half years ago." As of the writing of this Brief, it has now actually been more than 11 years since the policy limits were first offered to Petitioner.

D. No Interest Is Due Merely Because General Casualty Did Not Immediately Pay Its Policy Limits Into Court.

Petitioner's suggestion that General Casualty is somehow responsible for the interest because it did not pay the disputed sum into the court is supported neither in Wisconsin nor federal law. There is no procedure requiring payment of disputed sums into court. Even if there were, payment into the court would not have secured any interest for the Petitioner or any sort of repose for General Casualty. Statutory interest does not accrue on payments made into the court. The Petitioner would not have had access to the money until a satisfaction of judgment would have been agreed upon, which his counsel was unwilling to do.

The same result flows from the tolling doctrine. It is the

rejection of a valid offer of payment which terminated General Casualty's obligation under its contract and which would have precluded any recourse against the defendants directly for said interest after such an offer was refused.

To extract the award from a nondelinquent party at this point would be punitive, and that is not sanctioned in Wisconsin law. The District Court properly found that it was Petitioner's counsel's fault for refusing to accept the offers and for inexplicably refusing to take the easy and obvious steps *suggested to him by the District Court* to make the amount known and certain and allow satisfaction of the Judgment. The Court of Appeals agreed. The Petitioner's delinquent actions preclude him from benefiting from the delay which he caused in the first place.

In sum, the Petitioner cannot expand General Casualty's obligations based upon his own counsel's actions or inactions. The method of correcting the error and securing Petitioner's money was always available to Petitioner's counsel and was suggested to him by the court. The method was simple: agree to a judgment in the amount of the policy limits and accept General Casualty's offer of that sum. Their failure to make use of the appropriate procedures, combined with the demonstrated frivolity of the original argument which they used to "justify" their intransigence, leaves no basis for allowing them to benefit from their own unnecessary, and increasingly costly, delay.

III.

NO ISSUE PRESENTED BY THE PETITION REQUIRES THE SUPREME COURT'S ATTENTION.

The Petitioner claims the Court of Appeals' decision is violative of this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Petitioner oversimplifies that decision, but in general the

Respondent does not disagree with the contention that *Erie* stands for the proposition that a federal court must apply state law in a diversity case.

That is exactly what the District Court and the Court of Appeals have done. Relevant state law pertaining to these issues was applied. Discretion was utilized where appropriate. Equities were correctly balanced where suitable. State law was not improperly applied. Indeed, if anyone did not understand the applicable state law, it wasn't the lower courts. The District Court noted that the trial in this matter was "made much more difficult than it should have been by plaintiff's counsel's unfamiliarity with Wisconsin law . . ." (Petitioner's Appendix, p. 2.)

In its decision, the Court of Appeals made this observation of the contentions asserted by the Petitioner: "Some might find this argument creative; most would find it frivolous. None would find it persuasive." (Petitioner's Appendix, p. 10.)

That sums up the Petitioner's case fairly well. There is nothing noteworthy about this case such that it would justify this Court's review.

CONCLUSION

The Court of Appeals found that there were only two hurdles preventing the Petitioner from prevailing in this case: the law and common sense. For the reasons stated, the Court should reject the Petition and make whatever awards of costs, or double costs, it finds appropriate.

Respectfully submitted,

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